BRIEF IN SUPPORT OF PETITION.

1. In cases of insolvency where property is pledged for a particular purpose and the pledgeholder has not the means, power or machinery for carrying out the terms or purposes of the pledge, the pledged property must be turned over to the Receiver as the Court's officer subject, nevertheless, to the terms of the pledge.

Hobbs v. Occidental Life Insurance Co., 87 F. (2d) 380 (CCA 10, 1937);

Huffines v. American Security & Trust Co., (Court of Appeals, D. of C.) 71 F. (2d) 345 (1934);

Holloway v. Federal Reserve Life Ins. Co., 21 F. Supp. 516 (D. C. W. D. Missouri 1937);

Morrill v. American Reserve Bond Co., 151 F. 305 (C. C. W. D. Missouri, 1907);

Hankins v. Sallard, 188 So. 411 (La. 1939);

Petition of State, 182 S. Carolina 369, 189 S. E. 475 (1937);

Aetna Casualty & Surety Co. v. International Re-Insurance Corporation, 117 N. J. Eq. 190, 175 A. 114 (1934);

Cogliano v. Ferguson, 245 Mass. 364, 139 N. E. 527 (1923);

Phillips v. Perue, 111 Tex. 112, 229 S. W. 849 (1921); [19]

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[19] Semble:
Hopkins v. Lancaster, 254 F. 190, 192 (D. C. N. D. Ala., 1918).
Relfe v. Spear, 6 Mo. App. 129 (1878).
Sangamon Loan & Trust Co. v. Peoples Saving Bank & Trust Co., 204 Ill. App. 7 (1917).
Van Gilder v. Parker, 69 Col. 196, 193 P. 664 (1920).

Examination will show that the cases cited by the Circuit Court to the contrary [20] are all cases where the pledgeholder had the power and machinery for carrying out the terms of the pledge.

2. The conflict between the decision of the Circuit Court for the Third Circuit and that of the Circuit Court for the Fifth Circuit in the case of **National Surety Co. of N. Y. v. Cobb, 66 F. (2d) 323, (CCA 5, 1933)** is inescapable.

In the February 8, 1940 opinion of the Circuit Court, although the **National Surety Company** case had been cited in Petitioners' brief, no direct mention of this case was made by the Court.[21] Instead, the Court cited Section 29 of the General Corporation Law of New York, as amended by the Laws of 1932 c. 552 (22 N. Y. Consol. Laws (McKinney), Pocket Supp.), where it is provided that "Upon the dissolution of a corporation for any cause and whether voluntary or involuntary its corporate existence shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations * * * and it may sue and be sued in its corporate name". The **National Surety Co.** case was not mentioned at all in the Court's opinion on reargument.[22]

The Court also cites *Bloedorn v. Washington Times,* 89 F. (2d) 835 (CCA D. C. 1937) for the proposition that it is still possible to sue a New York corporation outside of New York despite dissolution at the domicile. But the *Bloedorn* case did not involve an insurance company, and in the **National Surety Company** case it was expressly and definitely decided that Section 29 of the General Corpora-

[20] R. p. 240.
[21] R. pp. 237-244.
[22] R. pp. 279-282.

tion Law of New York did not apply to the case of an insurance company. The Circuit Court for the Fifth Circuit in the **National Surety Company** case considered not only Section 29 of the General Corporation Act (cited by the Third Circuit Court herein, R. p. 243 and just recited above), but also Section 6 thereof which provides that no section of the General Corporation Act shall apply where in conflict with "any other corporate law". The Fifth Circuit Court in the **National Surety Company** case decided that Section 29 did not apply in the case of an insolvent insurance company because that section in such case was in conflict with Section 63 of the Insurance Code. (Subsequent amendments of both acts have not removed Section 6 or the inconsistency between the two codes).

In the petition it has already been set forth (pp. 10, 11) that the law of Pennsylvania under **Burns v. Niagara Life Insurance Company, 279 Pa. 453, 124 A. 128 (1924)**, is similar to the law of New York as laid down in the **National Surety Company** case, for which reason there does not exist a "public policy" opposing the general proposition as set forth by this Court in **Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160, 54 Sup. Ct. Rep. 615 (1934)**.

3. In declaring in its opinion [23] that upon proper application by the City (as one having a paramount right) the District Court could grant Respondent leave to sue in the appropriate tribunal and thus Respondent could obtain a judgment against Consolidated, citing *Meehan v. Connell Anthracite Mining Co.*, 318 Pa. 481, 178 A. 833 (1935), the Circuit Court asserts a conclusion which does not meet the insufficiency of the District Court's power to permit a suit against a defunct New York insurance company, which,

[23] R. pp. 243, 244.

under the laws of its domicile, as construed by both the Pennsylvania and Federal Courts, cannot be sued anywhere.

4. In deciding that there are now outstanding obligations of Consolidated, the Court below has introduced a startling innovation into the law of building contracts and commercial surety, one not directly supported by any previous authority, and this for the following reasons briefly summarized:

(a) Contracts such as the Golder contract [24] are not insurance contracts, as the Circuit Court in both opinions makes them, but building contracts. They must be capable of performance. This would seem to have occurred when the work covered by a contract is completed, accepted and paid for. The nature of the contract speaks loudly against any conclusion that a provision for permanent insurance was intended to be embraced.

(b) In rejecting any such reasonable interpretation of the type of contract involved, the Circuit Court parses the indemnity provision [25] as three *separate* engagements—to be answerable, to save harmless, and to pay. Despite the sense, and relying only on the punctuation of this age-old clause, the Court refuses to apply to the clause as an entirety the restrictive language attached to the third and concluding phrase thereof—that the losses or damages to be paid for by the contractor are only those **arising during the progress of the work.** The Circuit Court concludes that this restriction can be disregarded when determining that the contractor intended by all the language used to indemnify the Respondent for

[24] R. pp. 73-74. See p. 6 hereof.
[25] R. p. 280. See also p. 6 hereof.

eternity in respect to any claim arising in the indefinite future which could be traced to any happening before completion.

(c) If the Circuit Court's original conclusion is correct, no logical reason can exist for limiting the period of indemnity to six years. Such a conclusion, appearing in the opinion on reargument,[26] is helpful to Petitioners, but does not conform to logic or the record, wherein there is no evidence of *general* usage or custom whatever. It must not be forgotten that Respondent wrote the contract. It should be construed strictly against it. Also, the law abhors perpetuities. Certainly a strict construction against the other party should not be given to an ordinary clause in a building contract establishing a perpetuity where no American case could be found by the Court or the parties establishing such a novel proposition, and the only English case on similar facts is opposed.[27]

(d) The lower Court's determination that the contractor is permanently obligated to Respondent after completion (as one whose obligation is still not performed) is most unreasonable in the light of one of the ordinances referred to in the Golder contract. On R. pp. 75 and 76 it is recited that that contract is entered into subject to the provisions of various Acts of Assembly and Ordinances. The only one of these helpful to this Court's decision on the merits is the Ordinance of April 12, 1909 (Ordinances of 1909, p. 87). This provides for the deposit with the City Treasurer of cash, government or municipal bonds by contractors in lieu of corporate security. Section 4 of this

[26] R. pp. 281, 282.

[27] Ilford Gas Co. v. Ilford Urban District Council and Jackson, 3rd party, LXVII, The Justice of the Peace, p. 365 (Court of Appeals, 1903).

Ordinance permits the return of the cash or securities by the City Treasurer to the contractor "upon the expiration of the time for which the contractor is liable for the proper fulfillment" of his contract. Had Mandes Golder deposited $4,800,000 worth of Liberty Bonds in lieu of entering corporate security, it is not believed that any court would have construed his contract to mean that the "time of fulfillment" would never come. Certainly, a surety should have the same right as the contractor himself for the return of pledged collateral if, at the time of acceptance of his work and payment for the same, Respondent has no claim upon such collateral. Under the original decree of the Circuit Court there is no "time of fulfillment", as the contractor was declared to be bound forever to indemnify Respondent against future happenings. Under the second decree, the contractor might recover his property in six years, but there would still be no "time of fulfillment".

(e) The cases are clear that clauses like that here involved are not to be construed to place upon the contractor responsibility for the municipality's own negligence;[28] also, that after acceptance by a municipality of work done under a contract, the municipality alone is liable to third parties for accidents thereafter suffered by third parties, and this because the municipality accepted the work and had the duty of maintenance afterwards.[29] Latent defects

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[28] Flynn v. Philadelphia, 199 Pa. 476 (1901).
Morton v. Traction Co., 20 Pa. Super. Ct. 325 (1902).
Perry v. Payne, 217 Pa. 252 (1907).
Central Surety & Ins. Co. v. Hinton, 130 S. W. (2) 235 (Mo. 1939).
Wait: Engineering and Architectural Jurisprudence, Sec. 638.

[29] Boswell v. Laird, 8 Calif. 469 (1857).
Vogel v. The Mayor, etc. of New York, 92 N. Y. 10 (1883).

would give third parties no ground for action against Respondent. These propositions deprive the *Pollock* [30] case (cited by the Circuit Court (R. p. 242)) of any aptness to the facts at bar.

5. For any jeopardy Respondent might have as a result of accidents occurring *during* construction, the Act of 1937 [31] would seem to afford Respondent adequate protection.

It is therefore respectfully submitted that this petition should be allowed.

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First Presbyterian Congregation v. Smith, 163 Pa. 561 (1894).
Penna. R. R. Co. v. Roydhouse, 267 Pa. 368, 110 A. 277 (1920).
Khron v. Brock, 11 N. E. 748 (Mass. 1887).
Boston Excelsior Co. v. Continental Asphalt Paving Co., 114 N. Y. S. 825 (1909).
Memphis Asphalt & Paving Co. v. Fleming, 96 Ark. 442, 132 S. W. 222 (1910).
City of Richmond v. Jackson, 118 Va. 674, 88 S. E. 49 (1915).
Cunningham v. Gillespie Co., 241 Mass, 280, 135 N. E. 105 (1922).
Ford v. Sturgis, 14 F. (2d) 253 (CCA D. C. 1926).
Wait on Engineering and Architectural Jurisprudence, Sec. 643.

[30] Pollock v. Pittsburgh, Bessemer & Lake Erie R. R. Co., 275 Pa. 467, 119 A. 547 (1923). The case of Rudman et ux v. City of Scranton, 114 Pa. Super. Ct. 148, 173 A. 892 (1934) does not relate to a building contract and in deciding the case the Court has omitted completely an essential part of the contract.

[31] See appendix hereto, p. 29.